



August 23, 2012

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Office of the Comptroller of the Currency  
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Washington, DC 20219

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Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
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Washington, DC 20581

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitutional Avenue NW  
Washington, DC 20551

Robert Feldman, Executive Secretary  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street NW  
Washington, DC 20429  
Attention: Comments, Federal Deposit  
Insurance Corporation

Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

Re: **RIN 1557-AD44 [Document No. OCC-2011-0014]; 7100 AD 82; 3064-AD 85; 3235-AL07; RIN 3038-AD05**

Ladies and Gentlemen:

The American Securitization Forum (“ASF”)<sup>1</sup> appreciates the opportunity to submit this supplemental letter in response to the request of the Joint Regulators (as defined below) and the CFTC (as defined below) for comments regarding their notices of proposed rulemaking (each, an “NPR”) entitled “Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds” (the “Proposed Regulations”) (RIN 1557-AD44; 7100 AD 82; 3064-AD 85; 3235-AL07; RIN 3038-AD05),<sup>2</sup> issued pursuant to Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

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<sup>1</sup> The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to [www.americansecuritization.com](http://www.americansecuritization.com).

<sup>2</sup> See <http://www.gpo.gov/fdsys/pkg/FR-2011-11-07/pdf/2011-27184.pdf>.

(“Dodd-Frank”). Section 619 (the “Volcker Rule”) requires the Office of the Comptroller of the Currency (the “OCC”), the Board of Governors of the Federal Reserve System (the “Board”), the Federal Deposit Insurance Corporation (the “FDIC”), the Securities and Exchange Commission (the “SEC” and collectively with the OCC, the Board and the FDIC, the “Joint Regulators”), and the Commodity Futures Trading Commission (the “CFTC”) to implement rules to impose certain prohibitions on the ability of a banking entity to engage in proprietary trading and have certain interests in, and relationships with, hedge funds and private equity funds.

ASF submitted (i) a comment letter on February 13, 2012 to the Joint Regulators (the “February 13 Comment Letter”) with respect to the Proposed Regulations, (ii) a comment letter on April 13, 2012 to the CFTC (the “April 13 Comment Letter”) reiterating the comments in the February 13 Comment Letter with respect to the NPR issued solely by the CFTC<sup>3</sup> and (iii) a supplemental comment letter on July 27, 2012 to the Joint Regulators and the CFTC regarding the potential impact of the Proposed Regulations on intermediate entities that act as depositors to issuing entities in securitization transactions (the “July 27 Comment Letter” and, collectively with the February 13 Comment Letter and the April 13 Comment Letter, the “Prior Volcker Rule Comment Letters”).

In the Prior Volcker Rule Comment Letters, we outlined our industry’s concern that many securitizations<sup>4</sup> will be brought within the scope of the Proposed Regulations simply because they share the same exemptions from the Investment Company Act as traditional hedge and private equity funds. In light of changes to the Commodity Exchange Act (the “CEA”) and the CFTC’s related regulations (notably, the inclusion of “swaps” in the definition of “commodity interests”), we are similarly concerned that many securitizations may be classified as “commodity pools” under the CEA and, therefore, may be brought within the scope of the Proposed Regulations simply because they make limited use of swaps for hedging or risk management purposes.<sup>5,6</sup>

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<sup>3</sup> See [http://www.americansecuritization.com/uploadedFiles/ASF\\_Volcker\\_Rule\\_Comment\\_Letter\\_2-13-12.pdf](http://www.americansecuritization.com/uploadedFiles/ASF_Volcker_Rule_Comment_Letter_2-13-12.pdf) and [http://www.americansecuritization.com/uploadedFiles/ASF\\_CFTC\\_Volcker\\_Letter\\_4-13-12.pdf](http://www.americansecuritization.com/uploadedFiles/ASF_CFTC_Volcker_Letter_4-13-12.pdf).

<sup>4</sup> In this letter we refer to “securitizations” but note that the issues discussed here would also impact other similar vehicles that finance assets for banks, such as structured covered bonds issued by many European banks to investors based in the United States.

<sup>5</sup> The CEA and the CFTC’s rules thereunder define a commodity pool as an “investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests” and the definition of “commodity interests” will include swaps after the effective date of new CFTC regulations. In its release relating to the elimination or modifications of certain exemptions from commodity pool operator registration, the CFTC indicated that it considers a vehicle with a single swap to be a commodity pool. 77 Fed. Reg. 11252, 11258 (Feb. 24, 2012). In light of the CFTC’s historically broad interpretation of its authority with respect to vehicles that own commodity interests, we fear that securitization vehicles that are counterparties to swaps may be swept into the CFTC’s interpretation of “commodity pool.”

<sup>6</sup> We note that the CFTC has stated that “it is the position of the [CFTC] that a fund investing in an unaffiliated commodity pool is itself a commodity pool.” 77 Fed. Reg. 11252, 11268 (Feb. 24, 2012). We also note that the CFTC has taken the position, in connection with controlled foreign corporations wholly owned by registered



On August 17, 2012, ASF submitted a letter to the CFTC (the “CFTC Letter”) with regard to the potential treatment of certain securitization vehicles as “commodity pools.”<sup>7</sup> Most securitization vehicles that make limited use of swaps for hedging or risk management purposes are passive vehicles that do not have the defining characteristics of a commodity pool, in that they are not formed for the purpose of trading in commodity interests, but rather for the purpose of financing financial assets. Further, unlike typical commodity pools, securitization vehicles do not sell participations or equity interests that entitle their investors to a pro rata share of their accrued earnings and losses. However, many securitization vehicles may find themselves classified as commodity pools after the effective date of changes in law that bring swaps within the definition of commodity interests. While, as stated in the CFTC Letter, we do not believe that securitization vehicles should be treated as commodity pools, to the extent that they are, these vehicles would also be treated as “covered funds” within the meaning of the Proposed Regulations.

Because a substantial number of securitization vehicles use swaps to hedge interest rate or currency risk, the expansion of the scope of the Proposed Regulations – to treat a securitization vehicle as a covered fund simply because it is a swap counterparty – would have sweeping implications for the securitization industry. The expansion would scope into the Proposed Regulations a large number of securitization vehicles that, prior to the recent changes in the CFTC’s regulations, would not be covered funds because they rely on the exemptions afforded by Rule 3a-7 under the Investment Company Act or Section 3(c)(5) of the Investment Company Act rather than on Section 3(c)(1) or 3(c)(7). As a result, banking entities that sponsor securitization vehicles that use swaps to hedge interest rate or currency risk would not be able to maintain the ownership interests and other relationships they currently have with those vehicles.

As set forth in our Prior Volcker Rule Comment Letters, we believe that the Proposed Regulations were too expansive even before the CFTC noted its expansive views of the reach of the commodity pool definition to include vehicles holding a single swap, potentially encompassing a variety of securitizations that have none of the attributes of the private equity and hedge funds that Congress sought to address in the Volcker Rule. We believe that further expansion of the scope of the Proposed Regulations to encompass a far broader array of securitization vehicles would be inappropriate and is inconsistent with Congressional intent. Congress did not specifically include “commodity pools” in the definition of hedge fund or private equity fund under the Volcker Rule. Instead, the concept of a commodity pool as a

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investment companies, that wholly owned subsidiaries – which by definition have a single equity investor, and thus are not collective investment vehicles – can nonetheless be commodity pools. *Id.* at 11260. We believe that these two positions, when combined with a broad interpretation of the effect of hedging swaps on commodity pool status, may lead to illogical results—for instance that a wholly owned subsidiary of a bank could own a mortgage-backed security issued by a trust that included an interest rate swap and thus be treated as both a commodity pool and a “covered fund.”

<sup>7</sup> See [http://www.americansecuritization.com/uploadedFiles/ASF\\_CP\\_Exclusion\\_Request\\_8\\_17\\_12.pdf](http://www.americansecuritization.com/uploadedFiles/ASF_CP_Exclusion_Request_8_17_12.pdf).

covered fund was added by the Joint Regulators in the Proposed Regulations.<sup>8</sup> The primary stated rationale for doing so is that such entities “are not generally subject to the Federal securities laws due to the instruments in which they invest or the fact that they are not organized in the United States or one or more States.”<sup>9</sup> In this letter, we do not seek to address the general treatment of commodity pools under the Volcker Rule. However, we strongly believe that the stated rationale for treating commodity pools as covered funds does not apply in the case of securitization vehicles, which are subject to comprehensive regulation under the Federal securities laws.

We further believe that this potential expansion of the scope of the Proposed Regulations may have been inadvertent. All of the extensive commentary of the Joint Regulators throughout the NPR regarding the implications of the Volcker Rule for securitization vehicles focuses on securitization vehicles that are covered funds because, like private equity and hedge funds, they rely on exemptions afforded under Section 3(c)(1) or Section 3(c)(7). There is no discussion in the NPR regarding the merits of securitizations as commodity pools, including in the commentary regarding the explicit statutory directive in Section 13(g)(2) of the Volcker Rule that “nothing in the [Volcker Rule] shall be construed to limit or restrict the ability of a banking entity... to sell or securitize loans in a manner otherwise permitted by law” (the “Securitization Exclusion”).

The potential that securitization vehicles that employ risk-mitigating swaps may be inadvertently scoped into the Volcker Rule prohibitions through an inappropriately expanded definition of “commodity pool” under the CEA highlights the need for a broad exemption for all securitization vehicles from the Volcker Rule prohibitions as requested in the February 13 Comment Letter. Nevertheless, if a broad exclusion is not granted for securitization, securitization vehicles that make use of swaps and that would become covered funds solely by reason of their technical treatment as “commodity pools” should be granted an exclusion from treatment as covered funds.<sup>10</sup>

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<sup>8</sup> In Question 218 of the NPR, the Joint Regulators specifically requested public comment regarding the appropriateness of including commodity pools within the definition of “covered funds.”

<sup>9</sup> Federal Reserve Vol. 76, No. 215, November 7, 2011, p. 68897.

<sup>10</sup> If the Joint Regulators and the CFTC choose to address our concern by such an exclusion, we reiterate our proposal in Appendix A to the February 13 Comment Letter that the following additional clause be added at the end of the definition of “covered fund” in § \_\_.10(b)(1)(ii) of the Proposed Regulations: “‘Covered Fund’ does not include (i) any issuer or depositor with respect to an asset-backed security, as such term is defined in Section 3 of the Exchange Act or (ii) any ABCP conduit whether or not it is an issuer of asset-backed securities as defined in Section 3 of the Exchange Act.”

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ASF very much appreciates the opportunity to provide the foregoing additional comments in response to the Joint Regulators' Proposed Regulations. We think that the issues addressed in this letter underscore the importance of a coordinated effort among the Joint Regulators and the CFTC to produce a unified set of final Volcker Rule regulations that work in concert with other regulations implemented under Dodd-Frank. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me at 212.412.7107 or at [tdeutsch@americansecuritization.com](mailto:tdeutsch@americansecuritization.com), Evan Siegert, ASF Managing Director, Senior Counsel, at 212.412.7109 or at [esiegert@americansecuritization.com](mailto:esiegert@americansecuritization.com), or ASF's outside counsel on these matters, Tim Mohan of Chapman and Cutler LLP at 312.845.2966 or at [mohan@chapman.com](mailto:mohan@chapman.com).

Sincerely,

A handwritten signature in black ink that reads "Tom Deutsch". The signature is written in a cursive, slightly stylized font.

Tom Deutsch  
Executive Director  
American Securitization Forum